No. 378.

Brf. of Knowlton & DeGoosh for Appellees

Office Supreme Court U.S.
FILED
NOV 7 1901
JAMES H. McKENNEY,
Clerk.

Filed Nov. 7, 1901.

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LUIGI STORTI, *Petitioner for Writ of Habeas Corpus*, Appellant,

*v.*

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On Appeal from the Circuit Court of the United States for the District of Massachusetts.

## *BRIEF FOR THE COMMONWEALTH AND FOR BENJAMIN F. BRIDGES.*

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### History of Proceedings.

The petition states with some detail the proceedings which have been had by and with reference to the petitioner. Some of them do not appear to be material to the consideration of the present appeal, but for convenience they may be summarized as follows: —

The petitioner, Luigi Storti, was duly indicted in the Superior Court for the county of Suffolk in the State of Massachusetts on the ninth day of December, 1899, for the murder of one Michele Calcucci. He was tried before a jury and found guilty in the first degree. The verdict was rendered July 1, 1900. Certain exceptions were taken by him at his trial. These exceptions were overruled by the Supreme Judicial Court of Massachusetts Jan. 2, 1901. *Commonwealth* v. *Storti*, 177 Mass. 339. On Jan. 4, 1901, he was sentenced, in accordance with the provisions of the Massachusetts statutes of 1898, chapter 326, to suffer the punishment of death by the passage of a current of electricity through his body within the week beginning Sunday, April 7, 1901. On April 9, 1901, the Governor of Massachusetts, by and with the advice and consent of

the Executive Council, respited his sentence, the term of the respite to expire on Saturday, May 11, 1901.

Meanwhile, to wit, on the thirteenth day of April, 1901, the petitioner filed a petition for a writ of *habeas corpus* and a petition for a writ of error in the Supreme Judicial Court of Massachusetts, both petitions raising the same question, to wit, that the punishment of death by electricity was a "cruel or unusual punishment," within Article 26 of the Massachusetts Declaration of Rights. These petitions were argued together, and the petition for a writ of *habeas corpus* was denied, and in the writ of error the judgment of the Superior Court was affirmed. These decisions were rendered on May 7, 1901, being four days before the expiration of the respite granted by the Governor. The opinion of the court is printed on page 28 of the record.

On the 10th day of May, 1901, which was but one day before the expiration of the respite granted by the Governor, the prisoner filed in the Circuit Court of the United States for the District of Massachusetts a petition for a writ of *habeas corpus*. This petition set forth the same matters urged in the petition for a writ of *habeas corpus* before the Supreme Judicial Court of Massachusetts, and some others not material now to be restated, excepting that they are not in substance or in form the allegations contained in the present petition. This petition was heard by the Circuit Court on May 11, 1901, and summarily denied. The petitioner thereupon appealed to the Supreme Court. The appeal was entered at the last term and is now docketed as No. 325, October Term, 1901. It was entered a few days before the expiration of the term. A motion was made by the Attorney-General of Massachusetts to have the appeal dismissed as frivolous. But owing to the requirement of the rules of this honorable court that three weeks' notice must be given of hearings upon such motions it was impossible to have the motion entertained before the adjournment of the court. The petition, therefore, went over until October, and was assigned for argument on the 28th day of October, 1901. At the beginning of this term, the petition, having apparently accomplished its only purpose of delaying the administration of justice, was, by agreement of the petitioner, dismissed.

Meanwhile, to wit, on the 23d of May, 1901, the present petition for a writ of *habeas corpus* was filed in the Circuit Court of the United States. On May 24 a hearing was had and the petition

was dismissed on the ground of want of jurisdiction in the Circuit Court, and the circuit judge issued a certificate to that effect.

*In re Storti*, 109 Fed. Rep. 80. *Vid.* Record, p. 36. *Vid.* also 26 United States Statutes, chap. 517, § 5. U. S. Revised Statutes, § 753.

It may be added, to complete the historical statement, although the fact is not set forth in the record, that in consequence of a statute of the United States requiring a stay of proceedings during the pendency of the former writ of *habeas corpus*, that the Governor has from time to time respited the execution of the sentence. The last respite expires on the ninth day of November ensuing.

## Statement of the Case.

This petition alleges in substance the trial, conviction and sentence of the petitioner, and the respite of the Governor as above stated. It describes the respite as a "purported" respite, and sets forth that it expires on Saturday, May 11; and further alleges as follows: "and there has been no further lawful pardon, commutation or respite of the sentence by the Governor as provided in section 3 of said chapter 326" (being the statute under which he was sentenced and which is hereinafter set forth). The petition further sets forth that on May 10, 1901, the day before his respite expired, the petitioner filed in the Superior Court a motion for a new trial. This motion was filed under the provisions of the Public Statutes of Massachusetts, chapter 214, section 28 (said statute is hereinafter set forth). The petition further alleges that the motion is still pending and undetermined. The prisoner is alleged to be a subject of the kingdom of Italy.

The assignments of reasons for the issuing of the writ are set forth in the record on pages 2 to 7, inclusive. With some prolixity and repetitions they set forth in substance the following grounds for the issuing of the writ, to wit:

*Assignments 1 and 7.* — That the week appointed by the court for the execution of the petitioner having elapsed without execution having been done upon him, and "without any lawful action by the Governor" in the way of respite, the respondent has no further authority to hold the prisoner or to inflict the death penalty, and that he is thereby denied his rights under the first section of the Fourteenth Amendment to the Constitution of the United States.

*Assignments 2 and 8.* — (After allegations similar to those in assignments 1 and 7) That the holding of the prisoner is in violation of his rights under the "third article of the now existing treaty between the United States of America and his majesty the King of Italy and section 6 of article 6 of the Constitution. The article of the treaty relied upon is printed on page 6 of the record.

*Assignment 3.* — That in consequence of the sentence to death to be performed within the period of a year the petitioner's rights to move for a new trial under the provisions of Public Statutes, chapter 214, section 28, are taken away in violation of the rights guaranteed to him by the first section of the Fourteenth Amendment to the Constitution.

*Assignment 4* is the same as assignment 3 excepting that the allegations of assignment 3 constituted a violation of his rights under the treaty.

*Assignment 5* is similar to assignments 3 and 4.

*Assignment 6.* — The prisoner alleges that he apprehends that he may be executed while the motion for a new trial in the state court is pending, and alleges that if he is so executed his rights under the Fourteenth Amendment, and under the treaty aforesaid, may be cut off.

## Statutes of Massachusetts referred to in this Brief.

*Sts. 1898, c. 326.*

An Act to regulate the Infliction of the Death Penalty.

Section 1. In pronouncing sentence of death upon a person convicted of a capital crime the court shall appoint a week within which such sentence shall be executed. The clerk of the court shall, as soon as may be, make out and deliver to the governor a certified copy of the whole record of the conviction and sentence, and shall immediately thereafter make out, sign and deliver to the sheriff of the county a warrant, under the seal of the court, stating the conviction and sentence, and the week appointed for the execution thereof, and shall at the same time transmit to the warden of the state prison a certified copy of the warrant. Such warrant shall be directed to the warden of the state prison, commanding the warden to cause execution to be done in accordance with the provisions of such sentence, upon some day within the week thus appointed.

Section 2. When a person is sentenced to the punishment of death he shall be confined in a jail or prison in the county in which

such sentence is pronounced until within ten days of the first day of the week appointed for the execution of the sentence. He shall, within such ten days, and at a time chosen by the sheriff of the county, be conveyed as secretly as may be, by the sheriff or such deputy as he may name, to the state prison, where the sentence is to be executed, and be delivered, together with the warrant, to the warden or the officer performing the duties of warden. From the time of such delivery until the infliction of the punishment of death upon him, unless he shall be lawfully discharged from such imprisonment, the convict under sentence shall be kept in a cell provided for the purpose, and no person shall be allowed access to him without an order of the court, except the officers of the prison, his counsel, his physician, a priest or minister of religion, if he shall desire one, and the members of his family.

SECTION 3. The sentence of death shall be executed by the warden of the state prison, or by a person or persons acting under the direction of the warden. Unless the governor pardons the offence, commutes the punishment therefor, or respites the execution, as provided by law, the execution shall be done within the week appointed by the court; and in case the execution is respited the sentence shall be executed within the week beginning on the day next after the day on which the term of respite expires. The execution shall be done upon such day as the warden shall select within the week determined as aforesaid, and at an hour between midnight and sunrise; but no previous announcement shall be made, except to the persons who shall be permitted to be present at such execution, as hereinafter provided.

SECTION 4. The punishment of death shall be inflicted within an enclosure or building provided for the purpose, adjoining the state prison.

SECTION 5. Beside the warden or deputy warden performing the execution, and such officers of the state prison as the warden may deem necessary, there shall be present at the execution the prison physician, the surgeon general of the militia, and the medical examiner of the district in which the state prison is situated, or, in case of their inability to be present, such physicians as the warden may approve, and the members of the medical profession present shall be the legal witnesses of the execution. There may also be present the sheriff of the county in which the sentence was pronounced, or his deputy, and a priest or minister of religion, and, with the approval of the warden, not more than three other persons.

SECTION 6. The punishment of death shall in every case be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead.

SECTION 7. When a warden inflicts the punishment of death upon a convict in obedience to a warrant from the court, he shall, as soon as may be, make return thereof under his hand, with the doings thereon, to the office of the clerk of said court.

SECTION 8. Nothing in this act shall apply to a person sentenced to death for a crime committed at any time before the passage of this act. The provisions of law for the infliction of punishment of death in existence at the time of the passage of this act are hereby continued in existence and applicable to all persons sentenced to death for crimes committed before the passage of this act.

SECTION 9. The warden of the state prison shall cause to be provided, in conformity with plans approved by the governor and council, the necessary building and appliances for the infliction of the punishment of death, in accordance with the requirements of this act. For the expenses of constructing such building and providing such appliances, including the necessary expenses of the warden in connection therewith, a sum not exceeding seven thousand five hundred dollars shall be allowed and paid out of the treasury of the commonwealth.

SECTION 10. The company furnishing electric power or light to the state prison shall provide all necessary electricity for executions at such times as the warden may direct.

SECTION 11. Sections thirty-two, thirty-three, thirty-seven, thirty-eight and thirty-nine of chapter two hundred and fifteen of the Public Statutes are hereby repealed.

SECTION 12. This act shall take effect upon its passage. [*Approved April 13, 1898.*]

*Pub. Sts. c. 214, § 28.*

"The supreme judicial court and superior court may at the term in which the trial of an indictment is had, or within one year thereafter, on the petition or motion in writing of the defendant, grant a new trial for any cause for which by law a new trial may be granted, or when it appears to the court that justice has not been done, and on such terms or conditions as the court shall direct."

ARGUMENT.

*Assignments 1 and 7* allege that the week appointed by the court for the execution of the petitioner having elapsed without execution having been done upon him and without any lawful action by the Governor in the way of respite, the respondent has no further authority to hold the prisoner or to inflict the death penalty, and that he is therefore denied his rights under the first section of the Fourteenth Amendment to the Constitution of the United States.

It is to be observed that these assignments in effect deny the legality of the first respite granted to the prisoner. It is not denied that this respite was granted under and in conformity to the provisions of the Massachusetts statutes of 1898, chapter 326, section 3. No allegation is made that the section in question is unconstitutional and no particular is pointed out in which the Governor failed to conform to the provisions of the statute. It is to be observed that the petitioner admits that the Governor of Massachusetts "purported" to respite his sentence, and he does not specify wherein the respite was unlawful. Nor does he deny that he was lawfully placed in the custody of the respondent. The respondent is unable to perceive how any federal question can arise upon the legality of that respite.

It is presumed, however, that the assignments intend indirectly to challenge the subsequent respites granted by the Governor, and of which, without doubt, the petitioner was fully informed. The language of the assignments is peculiar, its allegation being that the week appointed for execution elapsed "*without any lawful action by the Governor*" in the way of respite. Whether the language of these assignments is to be interpreted as an allegation that whatever action was taken by the Governor was unlawful, or, on the other hand, as an allegation that no action whatever was taken, and that, therefore, the respondent is holding him without any process of law whatever, the jurisdiction of the Circuit Court did not reach the case.

Lambert *v.* Barrett, 157 U. S. 697.

There is no allegation that the Statute of 1898, chapter 326, is unconstitutional or that the courts of Massachusetts have failed to protect the rights of the petitioner whenever they have been properly asserted. In that respect the petition is insufficient and no question of constitutional law is presented.

Whitten *v.* Tomlinson, 160 U. S. 231, 242.

If, however, the petitioner is proposing to contend that some provision of the Massachusetts statute has been violated, his remedy is not in the federal courts, but before the State court. It was not the intention of the various federal statutes relating to *habeas corpus* that questions involving the construction of State statutes not alleged to be unconstitutional should be tried out by a writ of *habeas corpus* from the federal courts. The only exception to this rule is when there is an allegation supported by sufficient allegations of fact that the provisions of the United States Constitution have been violated. It is not sufficient to allege that the prisoner is held without law, or that his sentence was not lawfully respited. Such general averments do not give jurisdiction to the federal courts.

But if, on the other hand, the language of the assignments is intended as an allegation that all lawful authority of the respondent has ceased and that he is holding the petitioner without process of law, then the State is eliminated from the controversy and it becomes a mere question between the respondent acting without authority and the petitioner, and the provisions of Revised Statutes, section 753, apply. This section is as follows: "The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he . . . is in custody in violation of the constitution or of a law or treaty of the United States." The Fourteenth Amendment does not confer upon the federal courts jurisdiction to correct erroneous or wilfully improper acts of State officers or State courts in violation or in disregard of law.

U. S. *v.* Cruikshank, 92 U. S. 542, 554.
Virginia *v.* Rives, 100 U. S. 313, 318.
United States *v.* Harris, 106 U. S. 629, 638.
Civil Rights Cases, 109 U. S. 3, 11, 13.
Logan *v.* United States, 144 U. S. 263, 290.
Arrowsmith *v.* Harmoning, 118 U. S. 194, 196.

*Assignments 2 and 8* allege that the petitioner is held in violation of the third article of the treaty between the United States and his majesty the king of Italy. The language of the treaty is quoted on page 6 of the record.

The same considerations which have been suggested with reference to the first and seventh allegations, as above set forth, apply to these assignments. The general allegation that the petitioner is held

in violation of this section of the treaty is insufficient to confer jurisdiction.

Whitten *v.* Tomlinson, 160 U. S. 231, 242.

Moreover, the treaty, like the Fourteenth Amendment, is directed to the government of the United States and the several states, and not to citizens thereof.

*Assignments 3, 4 and 5* allege that he was unlawfully imprisoned because his execution would deprive him of the right to file a motion for a new trial within the year provided by chapter 214, section 28, above quoted.

These assignments do not raise a federal question. The interpretation to be given to the Public Statutes of Massachusetts, chapter 214, section 28, is a question for the state courts alone. Moreover, inasmuch as more than a year has elapsed since the term in which the trial of the petitioner's indictment was had, the question is now moot; and, further, a motion for a new trial has been filed and is pending.

These assignments show no proper ground for *habeas corpus*. A judgment in favor of the plaintiff under such a petition would entitle him to be discharged. It is obvious that he has no right to be discharged, but only to have his life preserved until he could have an opportunity of presenting a motion for a new trial, unless it be claimed now for the first time (as, indeed, is expressly stated in the assignment), that by reason of the failure to sentence him to be executed at a time more than one year from the date of the sentence, made the whole proceeding void. That is not a federal question.

*Assignment 6* sets forth the apprehensions of the prisoner lest the respondent may disregard the statutes giving him an opportunity to present a motion for a new trial and cut off his right so to do by executing him. The respondent deems this assignment too obviously and characteristically frivolous to require argument at his hands.

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